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ABSTRACT

This paper explains that California school districts are charged with significant and varying responsibilities in both the requirements they must follow to adopt the amounts of Statutory School Fees and/or Alternative School Fees, as well as accounting for and reporting detailedinformation regarding the Reportable Fees they actually collect. The paper provides guidance in fulfilling these requirements. It suggests that although the individual processes can seem overwhelming, each process should be approached and undertaken separately, while keeping in mind the overall purpose of the combination of the processes and requirements. Approaching each process separately will ease the burden on school district staff of complying withseveral varying procedures and requirements simultaneously. Considering the overall purpose should assist in the satisfaction of each of the reporting requirements, as much of the information contained in each report is related. In addition, enlisting the assistance of consultants and legalcounsel will assist in satisfying the applicable requirements, although school district staff should remain highly involved in each process. Similarly, coordinating with consultants to prepare the FeeJustification Studies, School Facilities Needs Assessments, and related updates may provide school districts with the opportunity to incur less consulting costs, while school district staff may primarily rely on internal efforts to complete the Annual Reporting and Five-Year Reporting requirements. In this manner, all school districts may strive to more easily comply with all applicable reporting requirements in an efficient, thorough, and timely manner. (EV)

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**October 11-12, 2001**

# SCHOOL FEES

**By**
**Alexander Bowie**

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## *I. INTRODUCTION*

The need for funds for additional grade K-12 school facilities to accommodate students resulting from additional development has been an issue facing school districts in urbanizing areas for many years. This issue was addressed in the 1986 Legislative Session ("AB No. 2926"). The result was an assumed 100% State Funding of such needs less statutory school fees ("Level 1 Fees") collected throughout the school district during the period of time from the first approval of a project by the State Allocation Board ("SAB") through completion of construction less specified expenditures including interim classroom costs. The land development and home building industry assumed that AB No. 2926 precluded cities and counties when approving additional new development from requiring any financial contribution greater than provided by AB No. 2926. The then amount as to residential development was $1.50 per square foot adjusted to date to $2.05 per square foot. In the period following the enactment of AB No. 2926, judicial decisions ("*Mira/Hart/Murrieta* Decisions") determined to the contrary. These cases held that the Level 1 Fee as to new residential development now $2.05 per square foot ("Level 1 Fees") was only applicable to development as to which all legislative development approvals had been obtained. As to cities and counties that were asked for legislative approvals for additional new development, the *Mira/Hart/Murrieta* Decisions held that cities and counties may, and in some instances if requested by a school district, must require mitigation payments adequate to reduce school facility impacts to a level of insignificance.

This state of affairs lasted until the enactment of SB 50 in 1998. However, in the interim period, State bond elections to fund K-12 school facilities were, in some instances, held hostage while land developers and homebuilders sought a legislative repeal of the *Mira/Hart/Murrieta* Decisions.

The "quid pro quo" in 1998 for the repeal of the *Mira/Hart/Murrieta* Decisions was thought by many school districts to be State acceptance of a continuing obligation to fund school facilities. This was assumed in 1986 as well. But in that instance as well it did not turn out to be the case. The down payment of SB No. 50 was approximately $3.9 billion for school facilities in a 1998 State bond election, Proposition 1A. The resistance by school districts to a repeal of the *Mira/Hart/Murrieta* Decisions caved in and school districts accepted the concept of assumed future State Funding. Also, SB No. 50 included the possibility of higher school fees ("Level 2 Fees" and "Level 3 Fees") and ongoing "Financial Hardship Assistance" where local matching funds did not exist but reasonable efforts to generate such local funds had been accomplished. The authorized Level 3 Fee to be available to school districts when there were no remaining funds for apportionment by the SAB. Statutory prerequisites to be satisfied and documentation to be prepared annually were specified as a condition to impose Level 2 and Level 3 Fees. The Level 2 and Level 3 Fees statutorily specified have turned out to be inadequate. Also, uncertainty subsequently has occurred as to when Level 3 Fees may be required by school districts by reason of actions of the SAB.

This illogical inequity was created by the SAB decision to escrow remaining "New Construction" funds and disburse the remaining New Construction funds on a capped stretched out basis to June of 2002. This benefitted urban districts with a greater percentage of unhoused students and that asserted their projects had been delayed. This decision by the SAB is the subject of pending

litigation which has been decided at the trial court level adversely to school districts seeking the remaining available Proposition 1A funds. The effect has been and will be to prejudice many non-urban school districts. This is evidenced by current approved unfunded application as of September 26, 2001, of $1,379,350,507 for numerous school districts.

Hence, by reason of the "SB No. 50 Deal," cities and counties at this time have only limited authority when considering new development to require funding of school facilities. If a developer requests a development agreement for bond funding of development costs by a Mello-Roos CFD or similar financing or annexations to a city, we believe these requests may be denied or conditioned unless funding of school facilities to meet the needs created by such additional development is provided.

Also, it should be noted that a referendum by local voters to set aside legislative approvals of new development is a constitutionally provided and protected right. Enactment of growth management measures by the initiative process also is a constitutionally protected right. The procedure for either requires a specified number of signatures and solid community backing. Hence, this remedy is available as a practical matter only to smaller or mid-sized communities.

## *II. STATUTORY SCHOOL FEES*

School Districts, every other year as to Level 1 Fees and annually as to Level 2 and Level 3 Fees, are faced with issues in regard to adopting, collecting, accounting for and properly expending varying amounts of school fees. Specifically, school districts must satisfy specific requirements for such school fees including Government Code Section 66000 ("Fee Justification Studies"), SB 50 school facility needs analyses ("SFNAs") and SB 1693 annual and five-year reports (respectively, "Annual Reports" and "Five-Year Reports"). School districts should consider calendering actions as to these matters with adequate lead time and where possible, establish procedures to coordinate the preparation and adoption of these documents. The following discussion attempts to provide some guidance in doing so.

## *III. FEE JUSTIFICATION STUDIES/STATUTORY SCHOOL FEES*

### A. Description/Purpose

The most familiar of the reports school districts must prepare in relation to school fees is the Fee Justification Study relating to Level 1 Fees. Fee Justification Studies are prepared to serve as the basis for justifying the adoption of Level 1 Fees, pursuant to Education Code Section 17620 and Government Code Section 65995, to be levied on new residential construction and on new commercial/industrial construction ("Commercial/Industrial Fees") (collectively, "Statutory School Fees"). As further discussed below in these comments, we believe that school districts should prepare Fee Justification Studies to adopt Statutory School Fees even when school districts adopt "Alternative School Fees" (Level 2 Fees and Level 3 Fees) in amounts greater than the Level 1 Fees. For instance, a school district may fail to meet the specified eligibility requirements of levying such

Alternative School Fees on a continuous basis, or, the alternative fees may be challenged and rendered invalid. In addition, Alternative School Fees do not affect the Commercial/Industrial Fee amounts imposed by a school district on commercial/industrial construction. For these reasons, we believe that justification for the Statutory School Fees are important and should be kept current by a school district. However, we believe that each respective preparation and adoption process should be approached separately, as further discussed herein.

Statutory School Fees adopted on the basis of Government Code Section 65995 are currently authorized on a grade K-12 basis in the amount of $2.05 per square foot of assessable space as to residential construction the amount of $0.33 per square foot of chargeable covered and enclosed space as to commercial/industrial construction, respectively. The amount of these fees may be increased for inflation by the SAB on a bi-annual basis, with the most recent increase approved on January 26, 2000. The next increase will be approved by the SAB in January of 2002. In order for a school district to be authorized to collect these amounts, or a relevant portion thereof for non-unified school districts, a school district must prepare a Fee Justification Study which establishes that a school district is justified in collecting such amounts based on the required nexus findings discussed below and follow the specified statutory requirements relative to adopting or increase a Level 1 Fee.

B. Applicable Law and Timing of Preparation

In preparing a Fee Justification Study, school districts should be aware of the applicable statutory provisions, which include Education Code Section 17620, 17621, as well as Government Code Sections 65995, 66001 and 66016 *et seq*. Because the SAB approves increases in the Statutory School Fee amounts every two years. As to the increase, the documentation in some instances is prepared by staff, but often is prepared by a consultant hired by the school district. However, in order to save costs, school districts may attempt to avoid preparing entirely new Fee Justification Studies every two years by negotiating with a consultant to prepare a brief memorandum update of the most recent Fee Justification Study prepared for the school district, or school district staff may itself prepare such memorandum update based on the most recent information from the school district's files. The best explanation of the process is found in this regard is *Shappel Industries, Inc. v. Governing Board of the Milpitas Unified School District* (1991) 1 Cal.App.4th 218.

C. Preparation of the Fee Justification Study

As mentioned above, the Fee Justification Study must make determinations which satisfy the requirements of Government Code Section 66001 and establish a nexus between the type of development in a school district and the amount of fees levied upon such development based on the need for such fees. The specific findings required are as follows:

1. Identify the purpose of the fee;

2. Identify the use to which the fee is to be put;

3. Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed; and

4. Determine how there is a reasonable relationship between the need for the public facility and the type of development on which the fee is imposed.

In accordance with the ability to impose Level 1 Fees including Commercial/Industrial Fees, the Fee Justification Study should include separate analyses with regard to residential development and commercial/industrial development. Therefore, each such analysis is discussed separately.

D. Residential Development Analysis

Specifically, the residential development portion of the Fee Justification Study should include an analysis as to the extent to which a nexus can be established in the school district between residential development, the need for school facilities and the amount of Level 1 Fees per square foot that may be levied for school facilities.

In particular, such analysis should include information regarding school facilities capacity and enrollment, housing projections, student generation, facility needs, facility costs within the school district and the need for the school district to levy school fees to partially fund such school facility costs. We recommend that housing projections be broken down into the appropriate residential land use designations, such as single family detached, multi-family attached and mobilehome dwelling units. Moreover, we suggest dwelling units be separated into mitigated (i.e. those dwelling units which are part of a community facilities district or the subject of a mitigation agreement and thus have already provided for mitigation of their school facility cost impacts on the school district) and unmitigated dwelling units within the school district. By multiplying the number of non-mitigated dwelling units in the school district by the student generation factors determined for each school level (i.e. grades K-6, 7-9, 10-12), which are based on the number of dwelling units in the school district and the number of students enrolled in the school district, the projected student enrollment from the projected unmitigated dwelling units can be calculated. After examining the school district's existing capacity to accommodate these projected students, the number of unhoused students can be determined and the amount of school facilities to accommodate these unhoused students can be calculated along with the resulting costs of providing such facilities.

The next step is to estimate the facility cost impacts for each type of dwelling unit and per square foot cost for each type of dwelling unit can be calculated. Most often, the facility cost impact per square foot far exceeds the maximum Level 1 Fee justified by law at any given time, which is currently $2.05 per square foot of assessable space on a K-12 basis. This facility cost impact per square foot therefore illustrates that the school district is justified in collecting the maximum amount of Level 1 Fees per square foot prescribed by law. Because the facility cost impact per square foot is often much higher than the Level 1 Fee amount authorized to be levied upon establishing the required nexus, a school district may be able to conserve costs in preparing new Fee Justification

Studies every two years by updating or supplementing any information contained therein, if necessary, in the form of a staff report or memorandum update either prepared by school district staff or a consultant. In this manner, the school district can get more years of use out of a recently prepared Fee Justification Study.

E. Commercial/Industrial Development Analysis

Similarly, the commercial/industrial development portion of the Fee Justification Study must establish a nexus in the school district between the categories of commercial/industrial development and the need for school facilities, the cost of school facilities and the amount of Commercial/Industrial Fees per square foot that may be levied for school facilities. Relevant commercial/industrial development categories include, retail, office, research and development, industrial/warehouse/manufacturing, hospital and hotel/motel development. In establishing this nexus for these categories, impacts such as employment, households, student generation, school facility costs and fee revenues should be evaluated for each applicable category. In essence, the employment impacts per category are used to estimate the facility cost impacts usually based on 1,000 square feet of commercial/industrial floor space per category. Such impacts are then compared to the Level 1 Fees and Commercial/Industrial Fees generated per 1,000 square feet of commercial/industrial development in each category to determine any resulting school facility cost shortfall. This shortfall, depending on the magnitude thereof, determines whether the school district is justified in collecting the maximum Commercial/Industrial Fees.

F. Adoption Process and Additional Recommendations

The procedure for adopting a Fee Justification Study, and the Level 1 Fees and Commercial/Industrial Fees, involves holding a public hearing after a public review period during which time the completed Fee Justification Study must be made available to the public for at least ten days. In addition, applicable mailing, posting and publishing notice requirements must be met. Because the SAB does not usually approve and announce the increased amounts until its meeting in late January, we recommend scheduling the public hearing in mid-February. After the public hearing has been conducted and the appropriate resolution and Fee Justification Study are adopted, the Statutory School Fees do not take effect for sixty days after adoption unless an urgency resolution has been adopted. Up to two such urgency resolutions may be adopted, which provide interim authorization for the adopted Statutory School Fees to be levied for thirty days per urgency resolution. Each urgency resolution should be adopted as part of a noticed public hearing and require a 4/5 vote of the governing board of the school district. Specific findings must be made on facts presented regarding a current and immediate threat to the public health, welfare or safety.

As a general matter, we recommend that this adoption process be completed separately from any proceedings related to the adoption of an SFNA (further discussed below). The SFNA statutory requirements, procedures and amounts varies substantially from the Statutory School Fees adoption process for Level 1 Fees. Undertaking both proceedings simultaneously can easily create confusion and frustration. Once adopted, the school district is required to file a copy of its Fee Justification Study, resolution, boundary map and any other related documentation relied upon in adopting the Statutory School Fees to all the relevant local planning agencies responsible for issuing building

permits within the school district . Until such filing or filings are made, building permits may be issued without the required payment. We also suggest that the school district include the appropriate city council and board of supervisors officials when submitting these documents.

## *IV. SCHOOL FACILITIES NEEDS ANALYSES/ALTERNATIVE SCHOOL FEES*

### A. Description/Purpose and Applicable Law

With the adoption of SB 50 and approval of Proposition 1A in 1998, school districts now have the option, upon meeting certain requirements, to adopt Alternative School Fees (Level 2 or Level 3 Fees) in accordance with Government Code Sections 65995.5, 65995.6 and 65995.7. As illustrated below, the preparation requirements in regard to adopting Alternative School Fees differ significantly from the Fee Justification Study preparation requirements. Moreover, such Alternative School Fees, which are individually calculated for each school district, apply solely to residential construction within a school district and are in excess of the Level 1 Fee currently authorized in the amount of $2.05 per square foot of assessable space, as discussed above. If a unified school district does not exist, each school district in such area must separately adopt its Level 2 or Level 3 Fee. More specifically, the Level 2 Fee, which amount is intended to represent approximately fifty percent (50%) of a school district's school facility costs, applies when the SAB is apportioning State Funding. The Level 3 Fee on the other hand, which is intended to represent approximately one hundred percent (100%) of a school district's school facility costs, applies when the SAB is no longer approving apportionments.

### B. Eligibility to Adopt Alternative School Fees and Timing of Preparation

In order to adopt Alternative School Fees, a school district must satisfy certain prerequisites, and then prepare and adopt an SFNA, following specific mandates regarding the contents of the SFNA as well as procedures regarding its adoption. Specifically, a school district must first make a timely application for State Funding to the SAB, which includes the completion and filing of Forms SAB 50-01, 50-02 and 50-03. Such forms may be completed by school district staff and/or with the assistance of a consultant. Subsequent to making such application, the school district must also either receive an eligibility determination ("ED") from the SAB regarding its application or will be deemed to have received such ED after the passage of one hundred twenty days (120) without a response from the SAB.

In addition, the school district must meet two of four of the following specific requirements which relate the following:

1. Percentage of "substantial enrollment" of the school district's multi-track-year-round education;

2. Meeting specified debt capacity requirements;

3. Holding a local general obligation bond election within the past four years which received at least fifty percent plus one of all votes cast and;

4. The percentage of relocatable classrooms within the school district.

A school district which meets these various requirements may commence the process of preparing or revising an SFNA and adopting Alternative School Fees at any time, provided that the procedural adoption requirements are adhered to.

In regard to the two of the eligibility requirements discussed above, the school district may be challenged unless it meets such requirements throughout the maximum one-year effective period of each SFNA. If one of the requirements is extinguished during the effective period of the Alternative School Fees and an additional requirement is not substituted in its place, the Alternative School Fee amounts established by the SFNA may be challenged and, if successful, only the lesser Level 1 Fee is applicable. As previously mentioned, for this reason we recommend that school districts also prepare Fee Justification Studies and adopt the most currently authorized Statutory School Fees even though it may have plans to adopt or has adopted an SFNA. Moreover, as Alternative School Fees adopted by a school district are only valid for a maximum of one year, we wish to note that an SFNA must be prepared on an annual basis, prior to the expiration of any previously adopted Level 2 or Level 3 Fees.

C. Preliminary Considerations

If a school district can satisfy the above-described eligibility requirements, it may proceed to prepare an SFNA and adopt Alternative School Fees. In determining whether or not to proceed with this process, the school district, prior to the preparation of an initial SFNA or a subsequent annual SFNA, should estimate, or attempt to obtain an estimate of the amount of its Level 2 Fee in relation to the present $2.05 per square foot Level 1 Fee or the school district's share thereof. As to Level 3 Fees, they may be imposed pursuant to Government Code Section 65995.7 when the SAB is not approving apportionments of New Construction funds. But for the *Godinez* settlement and SAB regulations ("SAB Regulations") adopted implementing such settlement, all the current "New Construction" funds would be exhausted. No school districts as yet are collecting Level 3 Fees pending issuance of an Attorney General's Opinion in this regarding requested by the SAB. For example, if the proposed Level 2 Fee is less than the current Level 1 Fee, a school district may wish to only complete a preliminary draft of the SFNA as attorney-client work product without finalizing, distributing or providing public notice of the SFNA until it appears that funds for apportionment by the SAB for new construction State Funding will be exhausted. In this regard, a school district may wish to defer the adoption of the Level 2 Fee because adopting the Level 2 Fee may motivate developers to question the validity of the current Level 1 Fee, and create undesirable confusion as to the ability to collect the Level 1 Fee amount. Alternatively, school districts may wish to monitor the availability of such State Funding with the goal of commencing the public review period and adopting the SFNA and Level 3 Fees thirty to sixty days prior to the time that State Funding is exhausted. Timely adoption coinciding with or slightly prior to State Funding being exhausted by the SAB for apportionment may be the most desirable and least confusing course of action for a school district to consider. Also, a school district should also consider whether it will be pursuing

Financial Hardship Funding. One of the current applicable qualifications therefor is the requirement to levy and collect the maximum applicable Alternative School Fees or an alternative revenue source equal to such amount in order to receive such Financial Hardship Funding. At present, all funds for Financial Hardship Funding have been exhausted.

D. Preparation of an SFNA

As mentioned above, the format of an SFNA will vary significantly from that of a Fee Justification Study by reason of th SB-50 statutory requirements as to the latter. Because the SFNA contains much more statutorily prescribed information than the Fee Justification Study, we recommend that the statutory requirements be strictly followed and referred to within the SFNA. Specifically, the crucial consideration is to provide the information required in Sections 65995.5, 65995.6, 65995.7 and 66000 *et seq.* of the Government Code. In preparing the SFNA, the school district should work closely with a consultant as well as competent legal counsel experienced in school fee matters to ensure the SFNA is prepared thoroughly and in accordance with statutory requirements. Moreover, a school district should plan ahead and give itself sufficient time to complete a potentially lengthy preparation and adoption process, including the additional requirements of AB 1367 passed in the 2001 Legislative Session which is awaiting the Governor's action. We assume it will become law effective January 1, 2002, and is discussed in detail hereinafter. We believe this adds 45 days to the process. In regard to selecting a consultant for preparation of the SFNA, a school district may wish to request proposals from several consultants or utilize a consultant who has previously worked with the school district and may be familiar with the school district's needs. In negotiating a price for the preparation of the SFNA, which may range from three thousand dollars ($3,000) to twenty thousand dollars ($20,000) or more. The school district should consider whether this price includes assistance with preparation of the SAB Forms, what number of meetings, SFNA drafts, and/or an annual update. A school district should also consider negotiating with the consultant regarding the preparation of a Fee Justification Study for the adoption of its Statutory School Fees, as appropriate, as some of the information in both studies is closely related and will have been recently analyzed in preparing the SFNA.

The following is a partial summary of specific items recommended to be considered in the preparation of an SFNA:

1. In order to satisfy the nexus requirements of Section 66000 *et seq.* of the Government Code, costs of school facilities at elementary, middle and high school grade levels based on a school district's school facility planning policies should be included in the SFNA as an exhibit or attachment to the SFNA. This might include a school district's cost per student, cost per dwelling unit ("DU") using an historical generation factor ("SGF") (as opposed to an SGF relating to DU constructed in the preceding five years) as well as a cost per square foot using historical average square footage for detached, attached and multi-family DU.

2. The SFNA should include a factual discussion to serve as the basis for satisfying two of the four statutory requirements which are prerequisites to adopting Alternative School Fees. These criteria are found in Government Code Section 65995.5(b)(3)(A)(B)(C) and (D). Please note that a school district may wish to consider avoiding using the provisions of Section 65995.5(b)(3)(A) which relates to substantial enrollment on the multi-track year-round basis, as using such factor increases capacity and thus would reduce the amount of the Level 2 Fee and Level 3 Fee.

3. The SFNA should include an analysis of the historical SGF of new residential DU constructed in the previous five years in the school district, or the city or county in which the school district is located. This historical SGF can be modified on the basis of relevant planning agency information but SGFs from some other source should not be used.

4. A school district should make a determination as to probable future DU by product type in the next five years. This determination will most likely be based on information from the relevant cities, counties and planning agencies. Future DU in a community facilities district or covered by a mitigation agreement we suggest should not be considered, although the SFNA should identify the total projected DU in the next five years and then distinguish such mitigated units from non-mitigated units. There may be exceptions where it is appropriate to consider the mitigated units as well, which should be decided on a case by case basis.

5. The SFNA should identify and consider existing or unused seating capacity by looking at current student enrollment in relation to Existing School Building Capacity as defined in Section 17071.10 of the Education Code. The Existing School Building Capacity should be what the school district has determined and set forth on its SAB Form 50-02. Also in this regard, as the Alternative School Fee amounts established by an SFNA and adopted by a school district are effective for only a maximum of one year, we wish to note that each time a school district adopts a subsequent SFNA, its Existing School Building Capacity must be recalculated pursuant to the AB 695.

6. The SFNA should identify and consider any surplus sites as well as any local sources other than fees, charges and dedications imposed on residential construction which are available for school facility purposes. However, the school district need not commit all or any specific portion of such identified amounts to needs occurring in the next five years. Instead, a school district, in its discretion, may make an allocation of such amounts to meet the existing needs in its education system to future development outside of the period identified in the next five years from the date of preparation of the SFNA. In addition, local sources might include unencumbered general obligation bond

funds; however, the ballot proposition for general obligation bond funds usually designates such proceeds to meet needs from existing development, not future new development, although there may be exceptions in some instances. However, successful bond propositions do not usually suggest that existing residents increase their taxes for the purpose of reducing costs resulting from new development within their community.

7. In addition, the amount of local funds, including Commercial/Industrial Fees, dedicated to needs from new development must be subtracted from the calculated grant amounts. In some instances, existing needs from commercial/industrial development exceed any such revenues and any consideration of future such Commercial/Industrial Fees would be speculative or conjectural at the time the SFNA is prepared. However, these fees should be reviewed at the time that each annual SFNA is prepared, considered and adopted. Also, it should be noted that students attending schools in a school district where their parent(s) are employed might be estimated and the cost thereof determined to create costs greater than such projected revenue, if any. We do not believe that any such revenue sources include tax increment funds relating to only a portion of a school district. Such amounts may or may not, depending on the facts, be a possible credit at some point in time to Level 2 Fees or Level 3 Fees as to portions of a school district within a particular project area of a local redevelopment agency.

8. As a school district's school facilities costs may well exceed the fifty percent and one hundred percent thresholds of which the respective Level 2 Fees and Level 3 Fees are intended to compensate, the school district's SFNA should include a section which sets forth to the best of its ability, the school district's actual school facility costs. This might be accomplished with the help of the school district's architect, and could be in the form of an exhibit to the SFNA. On this basis, it can be determined what the actual, roughly proportional, and reasonably related school facilities costs are to the school district. In most instances, these costs will be greater than the Level 2 and Level 3 Fees, therefore providing a factual basis that the Level 2 and Level 3 Fees are roughly proportional and reasonably related to, as well as not in excess of the actual costs of providing school facilities for the new development estimated to occur within a school district within the five year period addressed by the SFNA.

In general, the structure, format and wording of an SFNA should be easily understood. Also, all facts, rationale and reasons leading to conclusions set forth therein should be set forth as opposed to mere unsubstantiated conclusions not setting forth the facts or the reasoning upon which such conclusions are based. When information is derived from other sources or documents, such information should either be incorporated by reference or included as attachments or exhibits to the

SFNA. Where information is specifically required by statute, the consultants should not improvise or substitute their own opinions, but follow the mandates and dictates of the applicable statutory provisions.

E. Adoption Process and Additional Recommendations

The SFNA adoption process also requires strict compliance with statutory requirements and differs substantially from the adoption process related to the Fee Justification Studies and Level 1 Fees. Generally, as the final SFNA must be publicly reviewed for thirty days, and substantive changes to the SFNA during this period will re-start this thirty day period, we recommend an informal review of the SFNA be conducted prior to commencing the official public review period. This approach may assist the school district in avoiding making revisions to the SFNA and commencing an additional thirty day public review period as provided in Government Code Section 65995.5. In this regard, prior to commencing the public review period, it may be desirable to send a copy of the SFNA to the local chapter of the building industry association ("BIA") and conduct a "show-and-tell" presentation to the school district governing board. Following this approach may shorten the actual adoption process by avoiding an additional formal review of a document that one or more governing board members might desire to have changed prior to its adoption and filing with relevant cities and counties.

The provisions of AB 1367, enacted in the 2001 Legislative Session, must be considered in establishing the schedule for approval of an SFNA. AB 1367, among other matters adds Section 65352.2 to the Government Code.

Assuming AB 1367 becomes law effective January 1, 2002, it states that copies of any relevant proposed SFNA that relates to the potential expansion of existing school sites or the necessity to acquire additional school sites must be submitted at least forty-five (45) days prior to completion of the SFNA. This legislation requires the governing board of a school district to notify a city or county with land use jurisdiction forty-five (45) days prior to completion of the SFNA, and to meet with the city or county within fifteen (15) days of receiving notification that a meeting is requested.

After notice and consultation, if any, required by AB 1367, assuming it becomes effective on January 1, 2002, as well as expiration of the thirty (30) day public review and newspaper publication, posting and distribution requirements have been met, the school district's governing board must conduct a public hearing at which time the governing board must respond to written comments it has received on the SFNA. If a school district receives written comments on the SFNA during the public review period, such comments should be forwarded to legal counsel as soon as possible for written response, if time permits. In responding to written comments, the governing board should close the public hearing after all comments, oral and written, have been received into the record. The governing board may receive written responses to such comments drafted by its consultant, staff or and/or legal counsel into the record during the public hearing, address such comments and adopt the written responses by including a provision to that effect in the resolution which it must adopt after the public hearing to actually adopt the SFNA and the Alternative School

Fees. To assist in the public hearing process, if necessary, the consultant who prepared the SFNA and/or legal counsel should be present at the public hearing to address questions by the governing board and assist with comment responses. If several written comments have been received, it may be helpful to assemble a transcript of comments received and responded to for use at the public hearing.

Once the public hearing has been closed, comments have been addressed and the governing board desires to adopt the SFNA and Alternative School Fees, it adopts the appropriate resolution and the Alternative School Fees become effective immediately for a maximum of one year. The SFNA must be prepared, approved and the Alternative School Fees must be adopted on an annual basis following the same procedures as herein identified. We recommend that a school district complete relevant affidavits or declarations regarding compliance with the applicable procedural requirements in the event a challenge is made regarding the adoption process. Additionally, upon adoption, all documentation relied upon in adopting the Alternative School Fees, including the SFNA, the adopted resolution and a map of the school district's boundaries should be filed with all relevant cities and counties in which the school district is located. In this regard, if a school district plans to adopt or has adopted both an SFNA and a Fee Justification Study at or close to the same time, we recommend that the required filings for each adoption be completed separately, if possible, in order to assist the cities and counties in understanding the school district's complete fee schedule.

F. Preparation of SFNA Updates

An additional important consideration has arisen in regard to the requirement that a school district prepare an updated SFNA each year in order to continue to levy Alternative School Fees on new residential construction without interruption. Due to the pending Rosana Godinez v. Gray Davis lawsuit, the current SAB system of apportionments of State Funding to school districts pursuant to the Leroy F. Greene School Facilities Act of 1998 ("SFP") were changed in December of 2000. The manner in which the SAB had been apportioning State Funding to school districts pursuant to the SFP was challenged. The court has ordered the SAB to develop a mechanism to rank approved applications for State Funding of new construction on the basis of priority points in lieu of a first come first served basis. Accordingly, the SAB did so and on December 13, 2000, adopted SAB Regulations prejudicing many non-urban districts and prematurely implementing "Priority Points" as a pre-requisite to receiving an apportionment of funds. It did so not only by prematurely implementing Priority Points, but by escrowing $400 million until June of 2002 and providing for quarterly maximum allotments of approximately $124 million.

G. Reimbursement

When a school district begins requiring payment of Level 3 Fees, one option is for the school district to elect to reimburse a portion of the monies collected pursuant to Government Code 65995.7 as opposed to having some portion thereof deducted from future State Funding for a specific project. Specifically, a school district, to avoid such possible recapture by the SAB, may agree to reimburse "the person subject to the fee" (referred to herein as Developer for the purposes of this discussion) to the extent that the school district receives State funds for the construction of school facilities for

which the amount was required, less any amount expended by the school district for interim housing. The Developer subject to the fee, has the option of choosing whether the reimbursement election is made on a tract or lot basis. In addition, the reimbursement of funds must be made within thirty (30) days after the school district has received the state funds. In summary, there are three alternatives regarding this issue. These alternatives can be summarized as follows:

**Alternative No. 1:**

If a reimbursement agreement or a reimbursement election pursuant to Government Code Section 65995.7(a) is not in effect, Education Code Section 17070.20(b) provides that the State will reduce the amount of subsequent State Funding apportioned to a school district for school facilities which were identified in the SFNA pursuant to which Level 3 Fees were established. This amount is the total difference between the District's Level 2 Fees and Level 3 Fees collected pursuant to the SFNA which was then applicable. This deduction is not reduced by amounts expended by a school district for interim housing.

**Alternative No. 2:**

In lieu of the State deducting the entire difference between a school district's Level 2 Fees and Level 3 Fees, Government Code Section 65995.7(b) authorizes a school district to offer the Developer an election for reimbursement which provides the Developer with the right to receive reimbursement of the difference of the Level 2 Fees and Level 3 Fees collected if a school district receives State Funding for construction of facilities for which the Level 3 Fees were required.

However, under this Alternative No. 2, a school district may reduce the amount to be reimbursed by any amount the school district expends for interim housing. Although "interim housing" is not defined, presumably these interim housing amounts must relate to the dwelling units projected in the next five years as set forth in the applicable SFNA adopted by the school district. As a practical matter, school district staff will be responsible for tracking all applicable interim housing costs which may reduce the amount to be reimbursed to the Developer.

**Alternative No. 3:**

The third alternative provides that a school district may offer the Developer an opportunity to negotiate a mutually acceptable reimbursement agreement pursuant to Government Code Section 65995.7(c). We believe this provision allows the District to "contract around" the other two (2) alternatives. We note, however, that the amounts collected pursuant to this kind of agreement should be separately accounted for.

In light of the foregoing, it appears that Alternative No. 3 provides the most benefits and greater flexibility among the three (3) available reimbursement alternatives. School districts may wish to consider adopting a policy, by resolution, which encourages the pursuit of a mutually acceptable reimbursement agreement. In this manner, school districts could provide Developers with

an incentive to negotiate an agreement which may be more beneficial than either allowing the State to recapture the total spread between the Level 2 Fees and Level 3 Fees, or reducing the Developer's reimbursement amount by all applicable interim housing costs.

## *V. ANNUAL AND FIVE-YEAR REPORTS*

### A. Description/Purpose and Applicable Law

The preparation and adoption processes of the Fee Justification Studies and SFNAs discussed above relate to the varying amounts of fees a school district may impose on residential and/or commercial/industrial development within the boundaries of a school district. Once such reports have been adopted and the applicable fees are being collected, school districts also have specified responsibilities in regard to reporting the actual amounts of school fees collected over a specified period of time. Specifically, school districts must comply with Annual Reporting as well as Five-Year Reporting requirements, and make certain findings as set forth in SB 1693, passed in 1996, and Government Code Sections 66006 and 66001. The fees collected by school districts which are subject to these reporting requirements include both Statutory School Fees and Alternative School Fees (collectively, "Reportable Fees"). Although Reportable Fees do not by definition include mitigation payments received by a school district pursuant to a mitigation agreement or bond proceeds for purposes of the Annual Report, information regarding mitigation payments collected by a school district may need to be included in the Five-Year Report findings, where consultants prepare such studies, as further discussed below. Unlike the Fee Justification Study and SFNA preparation processes, the Annual Reporting and Five-Year Reporting process is one in which many school district business officials undertake to prepare in-house from information within the school district's files and with the assistance of legal counsel.

### B. Preparation of an Annual Report

As indicated by the name of the report, the Annual Report must be completed every year. However, to ensure that the appropriate requirements are complied with at the appropriate times, (as further discussed below in regard to preparation of the Five-Year Report), we recommend that school districts comply with both the Annual Reporting and Five-Year Reporting requirements simultaneously each year, assuming doing so does not create disproportionate burdens on school district staff. For purposes of this discussion, however, we will address the respective Annual Reporting and Five-Year Reporting requirements separately, below.

#### 1. Timing of Preparation

The Annual Reports must be made available to the public within one hundred eighty days after the last day of each fiscal year and fifteen) days prior to the public meeting of the school district's governing board to consider and act upon the Annual Report. This means that school districts should begin planning for the preparation of their Annual Report as early as July of each year, and should plan on beginning the preparation process no later than late October to ensure timely compliance and avoid incurring the penalty of refunding any unexpended amounts (discussed

below). We wish to emphasize that although the governing board meeting at which the Annual Report is considered and adopted may occur more than fifteen days after the Annual Report is made available to the public for public review, the Annual Report must be made available to the public pursuant to Government Code Section 66006(b)(1) by the one hundred eightieth (180) day after the last day of each fiscal year.

2. Information to be Reported

The type of information required to be included in the Annual Report generally relates to an accounting of the types and amounts of fees collected by the school district, as well as some information regarding the specific expenditures of the Reportable Fees by the school district during the reported fiscal year. Specifically, the Annual Report must include a description of the type of fees (i.e. the Reportable Fees) collected by the school district, the various amounts which may be collected by the school district, the beginning and ending balance of the appropriate accounts and sub-accounts of the school district, as well as the total amounts collected and interest earned. In addition, the school district must include specific and detailed information relating to each project on which Reportable Fees were expended, including the percentage actually funded by Reportable Fees for each project, the dates for commencement of construction for any incomplete projects for which sufficient funds have been collected, descriptions of any interfund transfers or loans made (including amount, date of repayment and rate of interest) as well as the amount of any refunds made where the administrative costs of refunding unexpended revenues is greater than the amount to be refunded. Such information should be obtained from the school district's internal business records, and for ease in preparation of the Annual Report, we suggest that school district business officials keep a separate file of this information. The file should include all relevant information to assist in making the required findings, and the school district business official may wish to continually monitor individual expenditures made on each project (i.e., to assist with the calculations relating to percentages of Reportable Fees expended on particular projects).

C. Preparation of a Five-Year Report

1. Timing of Preparation

Pursuant to Government Code Section 66001, the Five-Year Report must be completed by a school district every fifth fiscal year following the first deposit into the account or fund in which Reportable Fees are deposited. This may be difficult to ascertain. In addition, the Five-Year Report must include certain findings with regard to the portion of the account or subaccount that remains unexpended, whether or not such funds are committed or uncommitted to specific school facilities projects. Assuming that the first deposit was made in fiscal year 1986-1987, when school districts first became authorized to impose and collect Statutory School Fees, school districts had their first five year reporting requirement in fiscal year 1991-1992. The next five year reporting requirement would thus occur in fiscal year 1996-1997, and subsequently, 2001-2002. However, as some school districts may not have made their first deposit of Reportable Fees in fiscal year 1986-1987, but may have commenced making such deposits at a different time, an alternative first deposit date must be calculated. In addition, Government Code Section 66006 mandates that if the five year findings are not made at the appropriate juncture, school districts must refund any

unexpended moneys. In order to avoid possible confusion over the appropriate year in which to make the Five-Year Report findings, due to changes in personnel, for example, and to avoid risking this penalty provision, we recommend that the Annual Report and Five-Year Report be prepared each year. In addition, as the findings of the Five-Year Report, when it is prepared, must be prepared in conjunction with the information made available in the Annual Report, we suggest that all of the appropriate findings be included as the second portion of one comprehensive document.

2. Information to be Reported

The additional findings required to be included in the Five-Year Report can be generalized as an expansion of the findings included in the Annual Report and require more detailed information regarding the specific school facility projects of the school district. Such information causes the school district to illustrate the extent to which the Reportable Fees are required to service the school facility needs of the school district and the status of any progress made to satisfy such school facility needs identified by the school district. Initially, we wish to note that the Five-Year Report need not include a comprehensive account of the required findings for the entire previous five year period, but is a "snapshot" of the current fiscal year in with the Five-Year Report must be prepared. However, some school districts prefer to include such a comprehensive analysis in its Five-Year Report.

The specific information to be set forth in the Five-Year Report includes identifying the purpose to which the Reportable Fees are to be put and demonstrating a reasonable relationship between the Reportable Fees and the purpose for which they are charged. In this regard, findings may be made by identifying school facilities needs of the school district which are created by new development within the school district, where sufficient capacity in existing school facilities to accommodate such new students does not exist and establishing that such Reportable Fees do not exceed the costs of providing such school facilities for new students. In addition, the school district must identify all sources and amounts of funding anticipated to complete the financing of incomplete projects, as well as the approximate date on which such funding is expected to be deposited. Such funding is not limited to Reportable Fees, but may include State Funding actually apportioned to the school district pursuant to the Leroy F. Greene School Facilities Act of 1998. In addition, such funding may include general obligation bond proceeds which have been received and are committed to a specific project (or if not committed, include an explanation therefor), community facilities district proceeds, redevelopment funds, mitigation payments, certificates of participation proceeds and other related sources of funding.

In addition, if sufficient funds have been collected for funding any specific public improvement which is funded in whole or in part by Reportable Fees, and the specific public improvement remains incomplete, the school district must identify an approximate date as to when the construction of the public improvement will be commenced. A school district must identify this date within one hundred eighty days of making such a determination. Otherwise the school district is required to refund the unexpended money in such accounts or sub-accounts to the parties who paid

such funds to the school district pursuant to Government Code Section 66001.[1] As school districts presumably do not generally collect sufficient funds for any specific project, there may be no issue as to any potential refunds; however, a finding or findings to support such a conclusion should be made in the Five-Year Report.

D. Adoption Process and Additional Recommendations

The adoption process for the Annual Reports and Five-Year Reports is similar to that of the Fee Justification Study and SFNA adoption processes, although a formal public hearing is not required and the requirements vary slightly. The public review period, as mentioned above, is fifteen days prior to a regular meeting of the governing board of the school district, at which the Annual Report and/or Five-Year Report is considered and adopted by resolution. In addition, the school district must comply with a fifteen day mailed notice requirement. We also recommend that a notice of the public meeting be published and posted at least ten days prior to the regular meeting.

In regard to both the Annual Report and Five-Year Report, for easier tracking and reporting purposes of funds collected by a school district, we recommend that school districts establish three to five, separate subaccounts, as applicable, for each level of school fees (Level 1 Fees, Level 2 Fees and Level 3 Fees) as well as for mitigation payments and Commercial/Industrial Fees collected by the school district. Moreover, as recent school fee expenditures made by school districts have been subject to higher scrutiny by members of the building industry, school districts should ensure that the expenditures of its various school fees clearly relate to the accommodation of new students generated as a result of new construction within the school district after January 1, 1987. In addition, a limited portion of such school fees may be expended on certain administrative and adoption costs. If a school district expends any of its school fees on items not related to accommodating students generated from new construction within the school district, the school district should expect to provide justification of the appropriateness, nature and purpose of each such expenditure.

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[1]Alternatively, the school district may use the terminology "fund" or "sub-fund" as these terms are also used in Government Code Section 66000 *et seq.*

## *VI. CONCLUSION*

As illustrated by the above discussion, California school districts are charged with significant and varying responsibilities in both the requirements it must follow to adopt the amounts of Statutory School Fees and/or Alternative School Fees, as well as accounting for and reporting detailed information regarding the Reportable Fees it actually collects. Although the individual processes can seem overwhelming, each process should be approached and undertaken separately, while keeping in mind the overall purpose of the combination of the processes and requirements. Approaching each process separately will ease the burden on school district staff of complying with several varying procedures and requirements simultaneously. Considering the overall purpose should assist in the satisfaction of each of the reporting requirements, as much of the information contained in each report is related. In addition, enlisting the assistance of consultants and legal counsel will assist in satisfying the applicable requirements, although school district staff should remain highly involved in each process. Similarly, coordinating with consultants to prepare the Fee Justification Studies, SFNA and related updates may provide school districts with the opportunity to incur less consulting costs, while school district staff may primarily rely on internal efforts to complete the Annual Reporting and Five-Year Reporting requirements. In this manner, all school districts may strive to more easily comply with all applicable reporting requirements in an efficient, thorough and timely manner.

Should you have any questions or comments in regard to any of the matters contained herein or would like any assistance in regard to School Fees, please do not hesitate to contact Alex Bowie (abowie@bawg.com) or Julia Rice (jrice@bawg.com) at (800) 649-0997.

The applicability of the legal matters discussed may differ substantially in individual situations. The foregoing information has been prepared by Bowie, Arneson, Wiles & Giannone as an overview of the subjects discussed and should not be construed as individual legal advice.

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